No. 74-1106

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

GREGORY V. WASHINGTON

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 328 A.2d 98. The oral opinion (Pet. App. C) and the order (A. 70-71) of the superior court are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on November 6, 1974. On January 28, 1975, the Chief Justice extended the time within

which to file a petition for a writ of certiorari to and including March 6, 1975. The petition was filed on March 5, 1975, and was granted on June 1, 1976 (A. 72). The jurisdiction of this Court rests on 28 U.S.C. [redacted] 1257(3).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against compulsory self-incrimination requires the government to give warnings to grand jury witnesses who, by virtue of incriminating evidence already in the government's possession, are "potential defendants."

2. Whether the Self-Incrimination Clause or the Due Process Clause of the Fifth Amendment requires that grand jury witnesses who are "potential defendants" be given "target" warnings.

3. Whether, if any warnings are required, they must be given out of the presence of the grand jury.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

1. On the night of December 3, 1972, an officer of the Washington, D.C., police department stopped a van after observing it make a U-turn (A. 38). The officer then spotted a motorcycle in the back of the van that was listed as having been recently stolen

(*ibid.*). The two persons in the van, Samuel Zimmerman and Ruben Woodard, were thereupon arrested and the van was impounded. Zimmerman said that he thought that the motorcycle belonged to the owner of the van (A. 38-39).

The police determined that respondent owned the van and notified him that it was in the possession of the police department (A. 26, 39). At that point the police believed it possible that the van had been stolen from respondent by criminals involved in the motorcycle theft (A. 26). One or two days after the arrest of Zimmerman and Woodard, however, respondent went to the police department to recover the van and told the police officer on duty that he would not press charges against them because they were friends of his and had had his permission to use the van (A. 27-29). He explained the presence of the motorcycle by relating that he had been driving the van earlier in the evening and had offered assistance to a person whose motorcycle had broken down, that the van itself had broken down shortly after loading the motorcycle into it, and that he had thereupon left the owner of the motorcycle with the van, apparently to summon his friends to fix the van (A. 28-31). The officer to whom respondent related this story said that he did not believe respondent and told him that "I wouldn't go to court and testify to that fact because you're liable to be in trouble if you did" (A. 36). The officer did not release the van.

Respondent then went to the United States Attorney's office where he met with Assistant United States Attorney Richard Stuckey in an effort to arrange for release of the van. Stuckey similarly doubted respondent's story, but he released the van nonetheless, since respondent apparently needed it and the government had no evidentiary use for it (A. 44-45). Stuckey did, however, give respondent a subpoena to appear before the grand jury, knowing from past experience that friends of suspected criminals are often reluctant to testify about the suspects before the grand jury, and fearing that respondent would have no incentive to cooperate with further investigatory efforts once the van was released to him (A. 45-48). Stuckey also thought that respondent might not return voluntarily if respondent's story regarding the motorcycle were false (A. 48).

On February 5, 1973, respondent appeared before the grand jury. The government attorney in charge, Assistant United States Attorney Richard Shine, had not determined whether to seek an indictment against respondent. Rather, he was not sure himself what respondent's testimony would be, or whether it would be believable, and accordingly he decided simply to present "the whole matter to the Grand Jury so they could decide whether to ignore all three men or indict the two men who were arrested in possession of the truck or indict Mr. Washington by himself or do what they chose on whatever they decided to believe having heard the testimony of Mr. Washington" (A. 57, 58). Believing that there was a possibility that respondent would be indicted, however, Shine gave respondent the following warnings prior to asking him any question about the crime (A. 3-4):

> Q. Before I ask you any questions I have to tell you what your rights are. I'd like you to listen carefully and I'm going to ask you some questions about your rights afterwards.
>
> You are not under arrest. You're just here by way of subpoena.
>
> Before I, or anybody else in the Grand Jury, ask you any questions you must understand what your rights are.
>
> You have a right to remain silent. You are not required to say anything to us in this Grand Jury at any time or to answer any questions.
>
> Anything you say can be used against you in Court.
>
> You have the right to talk to a lawyer for advice before we question you and have him outside the Grand Jury during any questioning.
>
> If you cannot afford a lawyer and want one a lawyer will be provided for you.
>
> If you want to answer questions now without a lawyer present you will still have the right to stop answering at any time.
>
> You also have the right to stop answering at any time until you talk to a lawyer.
>
> Now, do you understand those rights, sir?
>
> A. Yes, I do.
>
> Q. And do you want to answer questions of the Grand Jury in reference to a stolen motorcycle that was found in your truck?
>
> A. Yes, sir.

Q. And do you want a lawyer here or outside the Grand Jury room while you answer those questions?

A. No, I don't think so.

Respondent was then shown a standard form containing *Miranda* warnings and an agreement to waive the Fifth Amendment privilege. He signed the form (A. 52) and was thereupon questioned about his knowledge of the motorcycle theft.[1] His testimony (much like his story earlier told to the policeman and the Assistant United States Attorney, but with some elaboration), was that he had offered aid to an individual (theretofore unknown to him) whose motorcycle had broken down; that his van had broken down shortly after the motorcycle was loaded onto it; that respondent went to a nearby gasoline station and telephoned Zimmerman and Woodard to come fix the van, leaving the motorcycle and its owner with the van; that he waited at the station for approximately two hours in vain for his friends; that when he then returned to where he had left the van it was gone; that he did not notify the police because he assumed that his friends had arrived, fixed the van, and driven it away; and that the motorcycle owner was never seen or heard from again (A. 4-20).

The grand jury indicted respondent, Zimmerman, and Woodard for grand larceny (22 D.C. Code 2201) and receiving stolen property (22 D.C. Code 2205).

[1] The form was the same one used by the Metropolitan Police Department prior to custodial questioning (A. 51, 64).

2. Respondent moved to quash the indictment on the ground that it was based on grand jury testimony obtained in violation of his privilege against self-incrimination. After a suppression hearing, the Superior Court for the District of Columbia held that the warnings given respondent did not adequately safeguard his Fifth Amendment rights (Pet. App. 19a) in that, because respondent was a suspect when he appeared before the grand jury, an inquiry should have been made "to determine what his educational background is, and what his formal education is, and whether or not he understands that this is a constitutional privilege and whether he fully understands the consequences of what might result in the event that he does waive his constitutional right and in the event that he does make incriminatory statements * * *" (Pet. App. 20a). The court also ruled that respondent should have been warned that his testimony could result in his indictment by the grand jury before which he was testifying, that thereafter he could be required to stand trial in a criminal court on prosecution for a criminal offense, and that statements made before the grand jury could be used against him at such trial (*ibid.*). The court accordingly suppressed respondent's grand jury testimony and dismissed the indictment against him.

The District of Columbia Court of Appeals affirmed the suppression order,[2] ruling that the warnings

[2] The court of appeals reversed the trial court's dismissal of the indictment (Pet. App. 4a-13a). Respondent's cross petition seeking review of that ruling was denied on June 1, 1976 (No. 74-6579).

given to respondent were deficient for the principal reason that the prosecutor had not advised respondent that he was a "potential defendant" and for the additional reason that the prosecutor had "wait[ed] until after administering the oath in the cloister of the grand jury before undertaking to furnish what advice was given" (Pet. App. 3a).

SUMMARY OF ARGUMENT

This case raises questions similar to those presented in *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976. In *Mandujano* the Court decided that the Fifth Amendment does not require that grand jury witnesses who are "putative" or "potential" defendants must be warned of their rights as a prerequisite to the use of their allegedly false grand jury testimony in a subsequent prosecution for perjury. Now the Court must decide whether the rule is different when, as here, the government seeks to use the witness's grand jury testimony in a prosecution for a crime other than perjury. We submit that the result should be the same.

In finding the warnings administered to respondent deficient, the court of appeals below has in effect ruled that "potential defendants" are constitutionally entitled both to full *Miranda* warnings (which respondent got) and to be explicitly advised of their "potential defendant" status (which respondent was not). It also held that the Constitution requires that these warnings be given out of the presence of the

grand jury. Thus, this decision goes significantly farther than that of the court of appeals in *Mandujano*, which held only that *Miranda* warnings are required.

For much the same reasons as we urged in *Mandujano*, we think that the Constitution requires no warnings whatever, least of all full *Miranda* warnings or "potential defendant" warnings. Even if we are wrong, and some warnings are held to be necessary, we submit that there is no basis for concluding that the Constitution requires them to be given out of the grand jury's presence.

1. Neither the interrogation of persons suspected of crime nor the use in evidence of incriminating admissions by a defendant is prohibited by the Fifth Amendment privilege against compelled self-incrimination. Moreover, the requirement of *Miranda* that interrogation be preceded by a full advice of rights is not itself an ingredient of the constitutional privilege but a prophylactic measure designed to neutralize the inherently coercive atmosphere perceived by the *Miranda* majority to pervade the process of incommunicado custodial police interrogation. *Michigan* v. *Tucker*, 417 U.S. 433, 444. The fatal flaw in the court of appeals' application of a warnings requirement to "putative defendants" called before a grand jury lies in the court's failure to consider the terms of the constitutional provision itself, particularly the requirement that there be compulsion of testimony in order to bring the privilege into play.

The salient features of incommunicado police interrogation, outlined at considerable length in the *Miranda* opinion, are markedly different in their potential for overbearing the will of the individual from the characteristics of grand jury questioning. *United States* v. *Mandujano*, *supra* (plurality op. 14-15). The latter takes place before at least 16 private citizens and the proceedings are often recorded, as they were here. The opportunities for use of physical force, threats, or trickery to overcome a witness's determination not to testify are thus virtually nonexistent. Accordingly, it has long been recognized by this Court that a grand jury witness must claim the privilege "or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States* v. *Monia*, 317 U.S. 424, 427. The continuing validity of that proposition was reaffirmed last Term in *Garner* v. *United States*, No. 74-100, decided March 23, 1976 (slip op. 6-7).

In short, to extend the concepts underlying a warnings requirement in the context of in-custody interrogation to questioning before a grand jury would be "an extravagant expansion never remotely contemplated by this Court in *Miranda*; the dynamics of constitutional interpretation do not compel constant extension of every doctrine announced by the Court" (*Mandujano*, *supra*, plurality op. 15).

Moreover, if grand jury questioning is to be equated with incommunicado police interrogation as inherently coercive, it is difficult to see why it is more coercive of "potential defendants" than of other wit-

nesses. Indeed, the "potential" or "putative" defendant concept is of no use in making the critical constitutional inquiry into compulsion. The tests for identifying "potential defendants" focus on the prosecutor's subjective intentions and/or the objective state of the government's evidence against the witness, whereas the presence or absence of impermissible compulsion turns upon the state of mind of the individual, upon the question whether, in the circumstances, it is likely that his will was overborne. A warnings requirement based on the Fifth Amendment privilege would accordingly rest upon the self-contradictory thesis that grand jury questioning is constitutionally coercive of some witnesses, who can be identified and distinguished from all others only on the basis of factors having nothing to do with coercion.

In sum, warnings regarding the privilege against compulsory self-incrimination are not required to precede any governmental questioning of an individual simply because the government may be on notice that the questions it plans to ask are likely, if answered, to result in incriminating evidence. Rather, the critical inquiry under the Self-Incrimination Clause is whether there has been "genuine compulsion of testimony" (*Michigan* v. *Tucker*, *supra*, 417 U.S. at 440); and whether a person has been compelled within the meaning of the Fifth Amendment, or whether certain situations may be said to be inherently coercive, has nothing to do with the strength or content of the government's suspicions at the time of the question-

ing. *Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976 (slip op. 6).

2. If the Self-Incrimination Clause does not require warnings regarding the privilege, then it follows that it does not require "potential defendant" or "target" warnings either, since a grand jury witness is not more coerced by the government's failure to advise him of his "putative defendant" status than by the failure to advise him of his privilege against compulsory self-incrimination. Even if, on the other hand, some form of advice regarding the privilege is required, a "target" warning is still unnecessary, for grand jury questioning can surely be no *more* coercive than in-custody police interrogation, where such additional warning is not required.

Nor does the Due Process Clause require "potential defendant" warnings. Such a warning can ordinarily be of utility to a grand jury witness only insofar as it may encourage him either to lie or to decline to answer. The former consequence would enjoy no protection in our system; the latter is fully protected by the Fifth Amendment's testimonial privilege. Thus, the Due Process Clause supplies no independent basis for requiring "target" warnings.

In any event, there is nothing fundamentally unfair in the failure to administer such warnings to grand jury witnesses such as respondent, and accordingly, there is no basis for holding them to be required by due process considerations. Those witnesses who actually are "potential defendants" are likely to know better than anyone else whether they committed

the crime under investigation, and it is not offensive to any reasonable concept of fairness for the government to question such witnesses without first reminding them that the grand jury may call them to task for such lawbreaking as they may have engaged in.

The facts of this case are illustrative. Respondent by his own volunteered statements to the authorities had demonstrated himself to be peculiarly knowledgeable about the circumstances surrounding a crime that he knew was under investigation. He also knew that his innocent explanation of his involvement had been disbelieved by the police officer to whom he first related it. Neither the government attorney who served him with the grand jury subpoena nor the one who questioned him before the grand jury had determined to seek an indictment against him prior to his testimony. In these circumstances the government's conduct in failing to tell respondent that he was a "potential defendant" can hardly be said to have been unfair at all, let alone to have violated "fundamental fairness" or to be "shocking to the universal sense of justice" (*Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 246).

In addition to lacking the requisite constitutional predicate, adoption of special rules for "potential defendants" that may tend to inhibit their cooperation with the grand jury is not good policy. It is common to call as grand jury witnesses individuals who are known or suspected to be involved in or at the fringes of the criminal activity under investigation (such persons are, after all, likely to be in the best position to supply relevant evidence); it is also common in

the case of most such witnesses, for a variety of reasons, that there is no fixed intent to prosecute, particularly if they are cooperative with the grand jury. The effective functioning of the grand jury would be seriously impeded by requiring administration of warnings designed to inhibit the testimonial cooperation of such witnesses.

The fact that the narrow self-interest of such witnesses might on occasion counsel a refusal to testify is no reason for society to adopt rules likely to discourage their cooperation with the grand jury's inquiry, so long as that cooperation is voluntary and has not been induced by force, threats, or trickery.

3. Finally, even if the Constitution does require some sort of warnings, neither the record below nor common sense supports the court's ruling that it also forbids their administration in the presence of the grand jury. Although the court of appeals articulated no reasons for its holding in this regard, it apparently was based on the notion that warnings so administered are ineffective, either because of the presence of the grand jury itself or the imminency of questioning. But no evidence in this case indicates that the timing of the warnings given respondent made them ineffective, or that, as a general matter, warnings given in the presence of the grand jury are ineffectual *per se*. Indeed, the reverse would seem equally if not more plausible: warnings given in front of the grand jury immediately before questioning are likely to be *most* effective, since that is the time nearest when the witness will have to decide whether to answer questions or invoke his privilege,

and the presence of the grand jurors might assure accurate warnings and lend special credence to the prosecutor's words.

In any event, the record below will not support the conclusion that the deliberative atmosphere of the grand jury room is any less conducive to rational decisionmaking by the witness than the courthouse hallway or the prosecutor's office, and accordingly the imposition of a constitutional requirement that such warnings as are necessary must be given out of the grand jury's presence was unwarranted.

ARGUMENT

I. Introduction

This case, like *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976, raises questions concerning the extent to which, if at all, the government is constitutionally required to give warnings to grand jury witnesses called to testify about criminal activities as to which the government possesses evidence suggesting that they may have been personally involved. In *Mandujano* the court of appeals had relied on both the Due Process and Self-Incrimination Clauses of the Fifth Amendment in affirming the suppression of the defendant's allegedly perjurious testimony on the ground that, although he had been a "putative defendant" at the time of his testimony, the government had neglected to give him full *Miranda* warnings. We urged reversal for the reasons that (1) no warnings, least of all *Miranda* warnings, are constitutionally required to be given to grand jury witnesses, whether or not "putative

defendants"; (2) Mandujano was not in fact a "putative defendant" at the time of his testimony; (3) witnesses may not avoid improper testimonial compulsion by false swearing; and (4) suppression was an inappropriate remedy even assuming a constitutional violation.

In voting to reverse, all eight Justices participating in *Mandujano* agreed that the government's conduct had not denied the defendant due process of law and that the privilege against self-incrimination could not be invoked to suppress perjurious testimony. There was accordingly no decision whether warnings of any sort are constitutionally required to be given to "putative defendants" in general, or what remedy is appropriate for a failure by the government to give any warnings that may be held to be required.

This case presents those issues squarely. The government sought to use respondent's grand jury testimony in prosecuting him for the theft that was the subject of the grand jury investigation.[3] The superior court suppressed that testimony on the ground that, even though the respondent had received full *Miranda* warnings before testifying, the government had not shown that he had "knowingly and intelligently waived" his privilege against self-incrimination (Pet. App. 19a), since it had neither inquired into respond-

[3] *United States* v. *Wong*, No. 74-635, certiorari granted, June 1, 1976, also raises the question whether warnings are necessary in the grand jury context, but that case involves a prosecution for allegedly perjurious grand jury testimony, and for that reason it is governed, in our view, by this Court's decision in *Mandujano*.

ent's educational background nor given him the added warning that his testimony " 'could result in [your] indictment by this very Grand Jury that you're testifying before and that thereafter you would be required to stand trial in a criminal court on prosecution for a criminal offense and whatever you say here could at that time be used against you' " (Pet. App. 20a). In affirming, the court of appeals ruled that the *Miranda* warnings given by the prosecutor were inadequate in view of his "failure to maintain a scrupulous concern that waiver must be knowingly and intelligently made," and that "the most significant failing of the prosecutor was in not advising [respondent] that he was a potential defendant" (Pet. App. 3a). The court also ruled that respondent had not been adequately advised of his rights for the additional reason that the prosecutor had given the *Miranda* warnings "in the cloister of the grand jury" (*ibid.*).

Thus, this case is like *Mandujano* insofar as the court below ruled (albeit implicitly) that grand jury witnesses against whom the government has some (unspecified) quantum of evidence of involvement in the crime or crimes under investigation are entitled by the Fifth Amendment's Self-Incrimination Clause to be given full *Miranda* warnings before testifying.[4]

[4] Unlike the lower court in *Mandujano*, the court of appeals in the present case did not mention the Due Process Clause and appears to have rested its holding on the Self-Incrimination Clause alone. We nonetheless address the due process issue (Part III, *infra*), viewing it as a potential alternative ground for the result reached by the court of appeals.

This case goes considerably beyond the court of appeals' ruling in *Mandujano*, however, in holding that such witnesses are, in addition, constitutionally entitled both to a "potential defendant" warning and to the receipt of all warnings out of the presence of the grand jury.

For much the same reasons as we urged in *Mandujano*, we believe that grand jury witnesses, even those who are "potential defendants," are not entitled by the Fifth Amendment privilege against compulsory self-incrimination to any warnings whatever (Part II, *infra*). We also argue that, whether or not some advice of the privilege against self-incrimination is held to be necessary, a "putative" or "potential" defendant warning is not constitutionally mandated and would be unsound as a matter of policy as well (Part III, *infra*). Finally, we submit that, even if the Constitution does require that warnings be given, it does not forbid their administration in the presence of the grand jury (Part IV, *infra*).

II. The Failure Expressly To Advise A "Potential Defendant" Of His Self-Incrimination Privilege Does Not Impermissibly Compel His Testimony In Violation Of The Fifth Amendment

The fruitfulness of a grand jury's inquiry will often depend on its ability to secure information from persons having knowledge of the type of criminal activity under investigation. Of necessity, such knowledge is most often possessed by those who themselves are involved in or at the fringes of such activities, and who thereafter are most likely to fall within the "potential defendant" category.[5] Accordingly, so long as it is not the product of improper compulsion or trickery, truthful testimony by "potential defendants" should be assiduously encouraged.

Although in this case the government attorney managing the grand jury gave respondent full *Miranda* warnings, and although it is common practice for government attorneys to advise grand jury witnesses who are suspected of involvement in the criminal activity under investigation of their privilege against self-incrimination, we submit that the

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[5] The court of appeals did not explain precisely what it meant by the expression "potential defendant," nor by what standards witnesses who are "potential defendants" are to be distinguished from other grand jury witnesses. Although "potential defendants," "putative defendants," and "targets" might well represent different categories of grand jury witnesses, depending on what standards are settled upon for identifying those witnesses who may be entitled to receive such warnings as might be held to be necessary, for the sake of convenience we use these expressions interchangeably. The problems in identifying such witnesses are discussed in Part III, *infra*.

Fifth Amendment does not require the routine administration of any warnings whatever. While the privilege against compulsory self-incrimination applies to proceedings before a grand jury (*Counselman* v. *Hitchcock*, 142 U.S. 547), there is no basis in the logic or history of the Fifth Amendment for requiring the "practical reinforcement" of the privilege (*Michigan* v. *Tucker*, 417 U.S. 433, 444) through the procedural safeguard of explicit warnings (*Miranda* v. *Arizona*, 384 U.S. 436). Put differently, the questioning of a witness before the grand jury—even a witness who is a potential defendant—is not so inherently coercive that any answers given by the witness must be presumed, absent warnings, to have been unconstitutionally compelled.

We begin our analysis with the general rule, long and firmly established in Fifth Amendment jurisprudence, that when an individual who is called (*e.g.*, by subpoena) to testify makes disclosures instead of claiming the privilege, the government has not compelled him to incriminate himself. *Garner* v. *United States*, No. 74-100, decided March 23, 1976 (slip op. 6); *United States* v. *Kordel*, 397 U.S. 1, 7-10; *Maness* v. *Meyers*, 419 U.S. 449, 466; *Smith* v. *United States*, 337 U.S. 137, 150; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 112-113; *United States* v. *Heike*, 175 Fed. 852, 858 (C.C. S.D.N.Y.); *United States* v. *Kimball*, 117 Fed. 156, 163, 165 (C.C. S.D.N.Y.). The rationale behind this rule can be traced directly to the language by which the privilege is expressed. The Fifth Amendment speaks of compulsion. "It does not preclude a witness

from testifying voluntarily in matters which may incriminate him" (*United States* v. *Monia*, 317 U.S. 424, 427). And this Court has recognized that the rule applies to grand jury witnesses as to any other. If a grand jury witness "desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment" (*ibid*).

"[T]he general rule that the privilege must be claimed" is subject to generic exception only in those "narrowly defined situations" characterized by some constant factor that has been "held to deny the individual a 'free choice to admit, to deny, or to refuse to answer' " (*Garner*, *supra*, at 9 (quoting from *Lisenba* v. *California*, 314 U.S. 219, 241)). In *Miranda* v. *Arizona*, this Court held that custodial interrogation was one such situation. It rested its ruling upon the conclusion that the particular nature and setting of incommunicado police interrogation is so inherently coercive that any statements made in response to such questioning should be presumed to have been compelled within the meaning of the Fifth Amendment unless the government could show that the interrogatee had knowingly and intelligently waived his privilege (384 U.S. at 467). This burden, the Court held, could ordinarily be discharged by proof that the police had given the interrogatee full warnings of his Fifth Amendment rights as a counter to the intimidating atmosphere of custodial interrogation (*id.* at 468-469).[6]

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[6] In addition to prescribing specific warnings of the kind that have come to be used generally by police across the Na-

Although the court of appeals in the present case did not articulate the rationale behind its holding, its implicit assumption that the Fifth Amendment requires that "potential defendants" appearing as witnesses before the grand jury be given *Miranda* warnings would appear to be predicated upon an analogy between the status of such witnesses and the situation of an arrested suspect during incommunicado police interrogation. The analogy fails, however, for two reasons: (1) the presumption adopted by this Court as the basis for its ruling in *Miranda* —that incommunicado custodial police interrogation is inherently coercive (see *Kirby* v. *Illinois*, 406 U.S. 682, 688)—is simply inapplicable to the grand jury setting; and (2) a witness's answers before the grand jury are no more likely to be compelled (in a constitutionally significant sense) if he is suspected of involvement in criminal activity of the sort the grand jury is investigating than if he is not.

A. *The Grand Jury Setting Is Not Inherently Coercive*

The police interrogation environment that formed the basis for the presumption of coercion in *Miranda* contrasts sharply with the nature of the grand jury and the setting in which grand jury questioning occurs. "*Miranda* addressed extra-judicial confessions or admissions procured in a hostile, unfamiliar environment which lacked procedural safeguards" (*United States* v. *Mandujano*, *supra*, plurality op.

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tion, the Court suggested it would also find satisfactory other prophylactic procedures "which are at least as effective" (384 U.S. at 467) in apprising the interrogatee of his rights.

14). In a grand jury investigation, however, to an even greater degree than in a normal consent search, "there is no evidence of any inherently coercive tactics —either from the nature of the * * * questioning or the environment in which it [takes] place. Indeed, * * * the specter of incommunicado police interrogation in some remote station house is simply inapposite" (*Schneckloth* v. *Bustamonte*, 412 U.S. 218, 247). See *United States* v. *Cleary*, 265 F.2d 459, 462 (C.A. 2) ("Appearing before a grand jury is not in itself an unduly coercive situation.").[7]

As the Court noted in *Miranda*, the danger of compulsion during police interrogation arises principally from the fact that the interrogation occurs in private. "The officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation' " (384 U.S. at 449; emphasis in original). Privacy is "essential to prevent distrac-

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[7] Most courts that have considered the issue have concluded that no grand jury witness, including a "potential" or "putative" defendant, is entitled to express Fifth Amendment warnings prior to testifying. See, *e.g.*, *United States* v. *Scully*, 225 F.2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Corallo*, 413 F.2d 1306 (C.A. 2), certiorari denied, 396 U.S. 958; *United States* v. *DiMichele*, 375 F.2d 959 (C.A. 3), certiorari denied, 389 U.S. 838; *Commonwealth of Pennsylvania* v. *Columbia Investment Corp.*, 457 Pa. 353, 325 A.2d 289; *State ex rel. Lowe* v. *Nelson*, 202 So.2d 232 (Fla. D.C. App.). But see, in addition to the court of appeals' decision in *Mandujano* (496 F.2d 1050), *United States* v. *Luxenberg*, 374 F.2d 241, 246 (C.A. 6); *United States* v. *Wong*, *supra*; *State* v. *Iverson*, 187 N.W.2d 1, 16 (N.D. Sup. Ct.).

tion and to deprive [a suspect] of any outside support" (*id.* at 455). The police may then "persuade, trick, or cajole [the suspect] out of exercising his constitutional rights" (*ibid.*). Privacy also permits the police to resort to "third degree" tactics, subjecting the suspect to mental or physical exhaustion over long periods of time (*ibid.*).

By contrast to the incommunicado setting in which police interrogation occurs, grand jury questioning takes place in the presence of no fewer than 16 private citizens (Rule 6(a), Fed. R. Crim. P.) who

> bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. *It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury.* [*In re Groban*, 352 U.S. 330, 347 (Black, J., dissenting; emphasis supplied).]

Moreover, grand jury questioning is at all times under the supervision of a presiding judge, and a transcript is often made of the proceedings (as was done in the instant case). Accordingly, there is little if any likelihood that a government attorney who questions a witness on behalf of the grand jury could resort to any of the coercive tactics potentially employable by police officers during incommunicado police interrogation. Nor, unlike police interrogation,

where "[p]rivacy results * * * in a gap in [judicial] knowledge as to what in fact goes on in the interrogation rooms" (*Miranda, supra*, 384 U.S. at 448), is there the possibility that—should coercive tactics be employed during grand jury questioning—they may go undetected and be unreviewable on a subsequent claim that the privilege was violated.

Nor does compliance with a subpoena to testify before the grand jury deprive a person of "his freedom of action in any significant way"—a deprivation that the Court in *Miranda* considered the equivalent of "custody" for purposes of defining the point at which "our adversary system of criminal proceedings commences" (384 U.S. at 477; but cf. *Kirby* v. *Illinois, supra*). To the contrary, as this Court noted in *United States* v. *Dionisio*, 410 U.S. 1, 10 (citation omitted):

> The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" * * *. * * *
>
> > "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court."

Moreover, the recipient of a grand jury subpoena, unlike an arrestee, has an opportunity in advance of questioning to consult with counsel and friends and

decide to what extent (if at all) he will respond to questioning. In addition, he can refuse compliance and subsequently contest the legality of a subpoena in a show cause hearing. *United States* v. *Ryan*, 402 U.S. 530, 533; *Cobbledick* v. *United States*, 309 U.S. 323. And, after he has appeared, he is free to resume his daily activities. See *United States* v. *Calandra*, 414 U.S. 338, 343.[8]

Finally, the court of appeals' implicit equation of grand jury investigations to custodial police interrogations utterly fails to recognize the vast difference in history and function of the two processes. The institution of the grand jury—unlike custodial police interrogation—is deeply rooted in Anglo-American history, serving for centuries "both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action." *United States* v. *Calandra*, 414 U.S. 338, 343. The founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "presentments or indictments of grand juries." Cf. *Costello* v. *United States*, 350 U.S. 359, 361-362.

[8] It has generally been recognized heretofore that in responding to a grand jury subpoena a witness is not placed in "custody." See, *e.g.*, *United States* v. *Binder*, 453 F.2d 805, 809 (C.A. 2); *Gollaher* v. *United States*, 419 F.2d 520 (C.A. 9), certiorari denied, 396 U.S. 960; *United States* v. *Capaldo*, 402 F.2d 821 (C.A. 2); *Kitchell* v. *United States*, 354 F.2d 715 (C.A. 1); *Jones* v. *United States*, 342 F.2d 863 (C.A.D.C.).

The grand jury's historic functions survive to this day. "Its responsibilities continue to include * * * the protection of citizens against unfounded criminal prosecutions," *United States* v. *Calandra*, *supra*, 414 U.S. at 343, and the scope of its powers continues to reflect its "special role in insuring fair and effective law enforcement" (*ibid.*). See also *Branzburg* v. *Hayes*, 408 U.S. 665, 686-700. Indeed, precisely because of its special constitutional role (and in sharp contrast to custodial police interrogation), "the long-standing principle that 'the public . . . has a right to every man's evidence' * * * is particularly applicable to grand jury proceedings" (*Branzburg* v. *Hayes*, *supra*, 408 U.S. at 688), where the duty to testify has long been recognized as a basic obligation that every citizen owes to his government. *Blackmer* v. *United States*, 284 U.S. 421, 438.

The imposition on this constitutional process of the administration of a set of warnings—"not themselves rights protected by the Constitution" (*Michigan* v. *Tucker*, *supra*, 417 U.S. at 444)—may tend to discourage citizens from providing the grand jury with information it needs to carry out its functions under the Fifth Amendment. The *Miranda* warnings, however, were never intended to create "a constitutional straitjacket" (*Miranda*, *supra*, 384 U.S. at 467) to be applied across the board to every form of official questioning. To extend the concepts behind that decision "to questioning before a grand jury inquiring into criminal activity under the guidance of a judge is an extravagant expansion never remotely contem-

plated by this Court in *Miranda*; the dynamics of constitutional interpretation do not compel constant extension of every doctrine announced by the Court" (*Mandujano, supra*, plurality op. 15).[9]

B. *Grand Jury Questioning Is No More Coercive Of A "Potential Defendant" Than Of Other Witnesses*

"[S]ince at least as long ago as 1807, when Chief Justice Marshall first gave attention to the matter in the trial of Aaron Burr, all have agreed that a necessary element of compulsory self-incrimination is some kind of compusion" (*Hoffa* v. *United States*, 385 U.S. 293, 303-304). We submit that a witness's answers before the grand jury are no more likely to be compelled because he is suspected of involvement in the criminal activities that the grand jury is investigating than if he is not, and that accordingly his status as a "potential" defendant has no constitutionally significant bearing on the question whether his testimony has been secured in violation of the Fifth Amendment.

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[9] The *Miranda* Court's careful limitation of its holding highlights the inapplicability of that decision to grand jury proceedings (384 U.S. at 477-478):

> General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

1. The difficulty of determining who is a "putative" or "potential" defendant highlights the anomaly of basing any warnings requirement on the privilege against self-incrimination. Assuming that some warnings are necessary for such persons, but that the Constitution does not require that they be administered to *every* witness called to testify before the grand jury, some means of identifying the "potential" or "putative" defendants entitled to the warnings must be devised. Yet the likely identification tests—examining either the subjective intent of the prosecutor (see *infra*, pp. 51-52) or the objective state of the evidence already in the government's possession (see Mr. Justice Brennan's concurring opinion in *Mandujano, supra*, pp. 14-15 & n. 15)—are irrelevant to the issue of compulsion. While the "putative defendant" concept may conceivably be helpful in a due process context (but see *infra*, pp. 42-48), we fail to see how the content of the prosecutor's mind or of his files—neither of which is ordinarily known to the witness—has any bearing whatever on the question whether the witness has been unconstitutionally compelled to incriminate himself.

In the *Miranda* context of custodial interrogation the "potential defendant" concept is irrelevant in defining the right to warnings: the presumption of inherent coerciveness applies regardless of whether, at the time of the questioning, the police have any basis for suspecting the interrogatee of a crime, or any intent to prefer charges against him. Similarly, although one suspected of involvement in the type of criminal activity under investigation may face a

greater likelihood that he will be asked questions calling for possibly incriminating responses, the government's mere knowledge or intention with regard to that individual, unaccompanied by any action or procedure that treats him differently from other grand jury witnesses who are called to testify because they also are likely to possess information useful to the grand jury to fulfill its constitutional function, does not make the questioning of a "potential defendant" any more coercive than the questioning of other grand jury witnesses. Such a person may, like any other witness, claim the Fifth Amendment privilege as an alternative to self-incrimination. He is certainly no more likely to be ignorant of his Fifth Amendment privilege than any other witness, who, like "virtually every schoolboy[,] is familiar with the concept, if not the language, of the provision that reads: 'No person . . . shall be compelled in any criminal case to be a witness against himself . . .'" (*Michigan* v. *Tucker*, *supra*, 417 U.S. at 439).

2. Mr. Justice Brennan's view—that a grand jury witness whom the government has probable cause to believe has committed a crime cannot be questioned before the grand jury absent "an intentional and intelligent waiver *** of his known right to be free from compulsory self-incrimination," and that "[s]uch a waiver could readily be demonstrated by proof that the individual was warned prior to questioning ***" (*Mandujano*, *supra*, concurring op. of Mr. Justice Brennan at 14, 16)—appears to be based, not on an analogy to the circumstances of custodial

interrogation that informed *Miranda*, but upon the notion that a knowing and intelligent waiver (and, therefore, a warning) is necessary principally "to enforce the guarantee of an adversary system" (*id.* at 4), of which the Fifth Amendment privilege is the essential mainstay (*id.* at 5).

We respectfully submit that this justification for departing from the "general rule that the privilege must be claimed" (*Garner* v. *United States*, *supra*, at 9) disregards the fact that the relevant inquiry under the Self-Incrimination Clause is whether there has been "genuine compulsion of testimony" (*Michigan* v. *Tucker*, *supra*, 417 U.S. at 440). The adversary system is not imperiled, nor the Fifth Amendment violated, unless the government "by *coercion* prove[s] its charge against an accused out of his own mouth" (*Rogers* v. *Richmond*, 365 U.S. 534, 541; emphasis added). The Fifth Amendment does not preclude a grand jury witness from testifying voluntarily in matters which may incriminate him (*United States* v. *Monia*, *supra*, 317 U.S. at 427); on the contrary, "those competent and freewilled to do so may give evidence against the whole world, themselves included" (*United States* v. *Kimball*, 117 Fed. 156, 163 (C.C. S.D.N.Y.)).

Miranda fully recognized that the heart of the matter is compulsion. That case presents the only circumstance in which this Court has ever held that a knowing and intelligent waiver of the privilege against self-incrimination is a prerequisite to the initiation of questioning by the government of an indi-

vidual not yet a defendant in a criminal case.[10] The predicate was the Court's conclusion that custodial interrogation is "inherently compelling" (384 U.S. at 467); that conclusion in turn "was grounded squarely in the Court's explicit and detailed assessment of the peculiar 'nature and setting of . . . in-custody interrogation,' 386 U.S., at 455" (*Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976, slip op. 6). The grand jury setting, however, as we have just elaborated, is not inherently coercive, and in our view that ought to be dispositive.[11]

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[10] In his concurring opinion in *Mandujano* (p. 3 n. 3), Mr. Justice Brennan seems to suggest, citing *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 238, that this Court in other decisions has insisted on a knowing and intelligent waiver of the privilege prior to questioning in contexts other than custodial interrogation. In *Schneckloth*, however, the Court simply observed that it "has evaluated the knowing and intelligent nature of the waiver of trial rights in trial-type situations, such as the waiver of the privilege against compulsory self-incrimination before an administrative agency or a congressional committee," citing *Smith* v. *United States*, 337 U.S. 137, and *Emspak* v. *United States*, 349 U.S. 190. In those two cases the question was whether an ambiguous statement by the witness had waived his privilege after it had been expressly invoked. In *Smith* the Court three times repeated the rule that the privilege must be claimed (337 U.S. at 147, 148, 150) before holding that "[a] witness cannot properly be held *after claim* to have waived his privilege * * * upon vague and uncertain terms" (*id.* at 150; emphasis added). *Emspak* was similar and deemed controlled by *Smith* (349 U.S. at 196). In neither case did the Court suggest that the witnesses were required to be expressly warned of their rights at the outset of their testimony (or at any other time) notwithstanding that they were clearly "potential defendants" under virtually any definition.

[11] This case does not present, and accordingly we do not discuss, the question whether a *de jure* defendant must be

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advised of his privilege before testifying before a grand jury. Although the lower courts have had occasion to treat the issue (see, *e.g.*, *United States* v. *Scully*, 225 F.2d 113 (C.A. 2), certiorari denied, 350 U.S. 897; *Perrone* v. *United States*, 416 F.2d 464, 466 (C.A. 2); *Jones* v. *United States*, 342 F.2d 863, 870 (C.A.D.C.); *Mulloney* v. *United States*, 79 F.2d 566, 579 (C.A. 1); *United States* v. *Kimball*, *supra*), this Court has never squarely passed upon it. In *United States* v. *Calandra*, 414 U.S. 338, in holding that a grand jury witness could not refuse to answer questions on the ground that they were based on evidence obtained from an unlawful search and seizure, the Court noted in *dicta* that a grand jury indictment valid on its face was immune from most sorts of challenges, even one alleging that it was based on evidence gained in violation of the defendant's Fifth Amendment privilege, citing *Lawn* v. *United States*, 355 U.S. 339 (414 U.S. at 345, 346). Thus *Calandra* cannot be said to have faced, let alone decided, whether a knowing and intelligent waiver is necessary before an actual defendant may be called before the grand jury.

In *Lawn* the defendant had first been charged by way of an information. He was then called to testify about the offense before a grand jury, which, acting on the basis of evidence obtained from him during his testimony, indicted him for a more serious crime relating to the same unlawful activity. The district court quashed the indictment on the ground that the defendant's privilege had been violated. 115 F. Supp. 674 (S.D. N.Y.). The government's appeal of that decision was dismissed as untimely. See *United States* v. *Giglio*, 232 F.2d 589, 594 n. 3 (C.A. 2). The government then secured another indictment against the defendant from a subsequent grand jury before which the defendant was not called, and the defendant was tried and convicted on that indictment. On appeal (*United States* v. *Giglio*, *supra*) and in this Court (*sub nom. Lawn* v. *United States*), the question was whether the defendant had satisfactorily shown that the second indictment had been based on evidence—assumed without discussion to be tainted (see *Giglio*, *supra*, 232 F.2d at 594 n. 3)—garnered from the first. The district court's earlier, unappealed ruling that the defendant's privilege had been violated by his appearance before the grand jury without warnings and waiver was by then the law of the case and was not a

Moreover, not every incident that eases the government's burden under our adversary system makes the system unconstitutionally inquisitorial. Nothing so tempers the adversary process, for example, as a voluntary confession or guilty plea. Thus, although the Fifth Amendment privilege against compulsory self-incrimination may have as one of its purposes the preservation of the adversary system (*United States* v. *Calandra*, *supra*, 414 U.S. at 343), that is not its sole purpose (*ibid.*). The privilege and the adversary system are not identities; and an event that diminishes the adversarial context of criminal proceedings does not necessarily violate the privilege as well.

3. There is some support in *dicta* in *Garner* v. *United States*, *supra* (slip op. 10, 13) for Mr. Justice Brennan's view (concurring op. in *Mandujano*, pp. 8-9) that a knowing and intelligent waiver of the privilege against self-incrimination is required whenever the government is on notice that the questions it plans to ask are likely to result, if answered, in incriminating evidence.[12] That language notwith-

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matter of contest. Thus this Court's decision in *Lawn* neither addressed nor settled the question whether a knowing and intelligent waiver is required when a defendant is called before the grand jury.

[12] We believe that this factor is actually relevant, not to the question whether particular statements have been compelled, but to the question whether statements that are deemed to have been compelled might nevertheless be used against their author. See *California* v. *Byers*, 402 U.S. 424, 427-431 (opinion of Chief Justice Burger).

standing, the clear holding in *Beckwith* v. *United States*, *supra*, established beyond peradventure that whether a person has been compelled within the meaning of the Fifth Amendment, or whether certain situations can be said to be inherently coercive, has nothing to do with "the strength or content of the government's suspicions at the time the questioning was conducted" (*United States* v. *Caiello*, 420 F.2d 471, 473 (C.A. 2), quoted in *Beckwith*, *supra*, slip op. 6).

Beckwith had been interviewed in the home of a friend by agents of the Internal Revenue Service investigating potential criminal tax violations. By virtue of the government's knowledge and suspicions, it was clear that Beckwith was the "focus" of a criminal investigation. He contended in this Court that he was therefore placed in the functional and legal equivalent of the *Miranda* situation by the interview and should have received full *Miranda* warnings. The Court rejected the argument, ruling that *Miranda* had required a knowing and intelligent waiver—and therefore warnings—because the circumstances of custodial interrogation were deemed inherently coercive, not because of any threat to the privilege against compulsory self-incrimination posed by the subject matter of the interview (slip op. 6). See also *United States* v. *Hall*, 421 F.2d 540, 544 (C.A. 2) (Friendly, J.); *Lowe* v. *United States*, 407 F.2d 1391 (C.A. 9); *United States* v. *Sicilia*, 475 F.2d 308 (C.A. 7).

Beckwith, not *Miranda*, controls this case. As we have set forth above (pp. 22-28, *supra*), the setting

and circumstances of grand jury proceedings are not inherently coercive, and therefore there is no need to depart in the grand jury context from the long-standing requirement that a witness must claim his privilege against compulsory self-incrimination or lose its benefit.[13]

III. Whether Or Not Some Witnesses Are Entitled To Be Advised Of Their Privilege Against Compulsory Self-Incrimination, "Putative Defendant" Warnings Are Not Constitutionally Required

A. *The Self-Incrimination Clause Provides No Basis For Imposing A Requirement That "Potential Defendants" Receive "Target" Warnings*

It is undisputed that the government attorney in charge of the grand jury investigation in this case gave respondent full *Miranda* warnings before asking him any questions in front of the grand jury (*infra*,

[13] This does not mean that grand jury witnesses are left unprotected from any coercive practices that may be discovered in particular cases. A grand jury interrogation, like any other noncustodial interrogation, "might possibly in some situations, by virtue of some special circumstances, be characterized as one where 'the behavior of . . . law enforcement officials was such as to overbear [an individual's] will to resist and bring about confessions not freely self-determined . . . .' *Rogers* v. *Richmond*, 365 U.S. 534, 544 (1961)" (*Beckwith, supra*, at 7). In such cases it will be the duty of a reviewing court to examine the entire record and independently determine whether the questioning was in fact unconstitutionally coercive. The presence or absence of warnings in such cases, however, while relevant evidence going to the ultimate issue, should not by itself be controlling. See *Beckwith, supra*, slip op. 7.

pp. 5-6; A. 3-4).[14] The trial court nonetheless found these warnings insufficient to protect respondent's privilege against compulsory self-incrimination and ruled, in addition, that the prosecutor should have told respondent that anything he said "could result in [your] indictment by this very Grand Jury that you're testifying before and that thereafter you would be required to stand trial in a criminal court on prose-

[14] Since respondent received a full panoply of *Miranda* warnings to which individuals facing custodial interrogation are entitled, this case does not squarely present the question whether, assuming that some advice regarding the self-incrimination privilege is required, the aspects of *Miranda* warnings that refer to a "right to remain silent" and a right to appointed counsel are appropriate in the grand jury context. The courts of appeals that have held some warnings regarding the privilege to be constitutionally required have not uniformly delineated the necessary components of such warnings. Compare the Fifth Circuit decision in *Mandujano* (496 F.2d 1050; holding that the full litany of *Miranda* warnings is required) with *United States* v. *Luxenberg*, 374 F.2d 241 (C.A. 6) (no mention of "right to silence" or of a right to appointed counsel), and with *United States* v. *Wong*, *supra* (C.A. 9) (no mention of a right to counsel). For the reasons stated at pages 32-40 of our brief in *Mandujano*, to which we respectfully refer the Court should it hold that some warnings are necessary and deem it appropriate to settle the uncertainty regarding the appropriate composition of such warnings, we believe that grand jury witnesses—even those who are "putative" or "potential" defendants—have no constitutional right to remain silent or to appointed counsel, and that full *Miranda* warnings would accordingly be inappropriate in the grand jury setting, whatever other warnings regarding the self-incrimination provision might be held to be required. See *Mandujano, supra* (plurality op. 16-17).

cution for a criminal offense and whatever you say here could at that time be used against you" (A. 67-68). In affirming, the court of appeals agreed with the trial court "that the most significant failing of the prosecutor was in not advising [respondent] that he was a potential defendant" (Pet. App. 3a).[15]

If, as we have argued above, the Self-Incrimination Clause does not require warnings regarding the privilege, then it follows that it does not require "target" warnings or "potential defendant" warnings either: a grand jury witness is surely not more coerced by the government's failure to advise him of his "putative" or "potential" defendant status than by the

[15] The court of appeals did not indicate, apart from its statement (Pet. App. 3a) that the government failed "to maintain a scrupulous concern that waiver must be knowingly and intelligently made," whether or not it endorsed the trial court's ruling (Pet. App. 20a; A. 71) that the government was obliged not only to administer full *Miranda* warnings and a "target" warning, but also to question respondent "to determine what his educational background is, and what his formal education is, and whether or not he understands that this is a constitutional privilege * * * and the consequences of what might result in the event that he does waive" it. The trial court cited no authority in support of this ruling, and we know of none. A witness's educational background and capacity for understanding any warnings that might be held to be required would be conceivably relevant to a claim of involuntariness, but there is no constitutional basis, we submit, for requiring additional prophylactic inquiries into these matters by the government as a necessary prerequisite to a knowing and intelligent waiver, assuming one is required.

failure to advise him of his privilege against compulsory self-incrimination.[16]

At the very least, the Self-Incrimination Clause cannot reasonably be held to require a "putative defendant" warning on top of full *Miranda* warnings (or any warnings regarding the privilege).[17]

[16] Standard 3.6(d) of the ABA Standards for Criminal Justice, *The Prosecution Function* (Approved Draft, 1971), relied upon by the court of appeals (Pet. App. 4a), states that a prosecutor should not seek to compel the testimony of a witness he believes to be a "potential defendant" "without informing him that he may be charged and that he should seek independent legal advice concerning his rights." Presumably the admonition to seek independent legal advice is considered effective to assure that the witness is apprised of his privilege against self-incrimination; thus the ABA Standard, like the court of appeals' decision, in effect requires both a warning designed to advise the witness of his privilege and a "target" warning on top of that. Such warnings are said to be required by "due regard for the privilege against self incrimination and the right to counsel" (Commentary to Standard 3.6). We elaborate in the text why we believe that the Fifth Amendment requires no such warnings, and at pages 37-39 of our brief in *Mandujano* we argue that there is no Sixth Amendment right to counsel in grand jury proceedings (a question that need not be addressed in this case, given that the court of appeals did not mention the Sixth Amendment and appears to have relied exclusively on the Fifth Amendment for its holding).

[17] To the best of our knowledge, no other court that has required some form of Fifth Amendment warning has ever held that a "putative" or "potential" defendant is also constitutionally entitled to be warned that he is a suspect. Several cases are squarely to the contrary, *e.g.*, *United States* v. *Binder*, *supra*, 453 F.2d at 810; *United States* v. *Mitchell*, 372 F. Supp. 1239, 1248 (S.D. N.Y.); *United States* v. *Potash*, 332 F. Supp. 730, 733 (S.D. N.Y.) (Weinfeld, J.); *United*

Only if there is some element of coerciveness inherent in grand jury proceedings that cannot be cured by some form of advice of rights would such an additional warning be justified. Whether or not the Court accepts our position that questioning before the grand jury is not inherently coercive, it seems to us beyond dispute that the grand jury setting is no *more* coercive than police custody, where such additional warning is not required. Thus, "[i]f [*Miranda*] warnings are adequate to protect a defendant in the hostile environment of custodial interrogation[,] they are surely sufficient with a witness appearing before a grand jury of citizens to be questioned by a government attorney, with a record of the proceedings made by a stenographer." *United States* v. *Binder*, *supra*, 453 F.2d at 810 (Lumbard, J.).

In most instances witnesses are likely to have equally as good, if not a far better, idea than the prosecutor or the grand jury of whether they are indeed "potential defendants," making a warning to this effect doubly unnecessary as a matter of constitutional law. See *United States* v. *Potash*, 332 F. Supp. 730, 733 (S.D. N.Y.); *United States* v. *Kim-*

States v. *Owens-Corning Fiberglas Corp.*, 271 F. Supp. 561, 566-567 (N.D. Cal.); *United States* v. *Kimball*, *supra*, 117 Fed. at 166-167; see also *United States* v. *Del Toro*, 513 F.2d 656, 664 (C.A. 2).

In *United States* v. *Jacobs*, 531 F.2d 87 (C.A. 2), ruling on the basis of its "supervisory powers" rather than under the Constitution, the court affirmed the suppression of the defendant's allegedly perjurious grand jury testimony on the ground that she had not been warned that she was a "putative defendant." The court did not decide what, if any, warnings

ball, *supra*.[18] In the present case respondent had had his self-incrimination privilege expressly called to his attention and had been explicitly warned that anything he said might be used against him. He knew that the grand jury was investigating a crime with which he had had some connection and that his connection was known to the authorities by virtue of his own previously volunteered statements.[19] The police officer to whom respondent first related his story had told him that it was unbelievable and that if he repeated it in court it was likely to get him into trouble

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are required by the Constitution. Rather, having learned that federal prosecutors in the Second Circuit generally follow the practice of giving "putative defendant" warnings, the court ordered the testimony suppressed "[i]n the interest of uniformity in criminal procedure within the circuit" (531 F.2d at 90). The government's petition for review of this decision is now pending in this Court (No. 75-1883).

[18] "If the danger of indictment was so clearly known to anybody, it was known peculiarly to the defendants, if the allegations of the indictment be accepted as true; for they were in such case the very actors. The grand jury was merely investigating. Knowledge on its part, or that of the United States attorney, came no faster than the witnesses having the information revealed it. * * * The jury knew, and they did not, is the present plea; and they did not refuse to testify because they did not understand that they were in peril of indictment. Such contention is idle on its face * * *. * * * The jury began in darkness, and came by degrees to the light which, in its view, revealed these defendants as wrongdoers." *Kimball*, *supra*, 117 Fed. at 166.

[19] In this respect the instant case is unlike *Mandujano*, *Wong*, or *Jacobs*, in all of which the defendants were unaware at the time of their grand jury testimony of the extent of the potentially incriminating evidence in the government's possession.

(A. 36). In holding, under these circumstances, that respondent was constitutionally entitled not only to *Miranda* warnings but also to an additional "putative" or "potential" defendant warning—a warning that is in our view far removed from the governmental obligation to guard against compulsion of self-incriminating statements—the decision below transmutes the Fifth Amendment policy against compulsion into a general policy to discourage admissions or statements of any kind to the grand jury.

B. *The Failure To Give Respondent A "Target" Warning Did Not Violate The Due Process Clause*

Although the court of appeals in the present case did not purport to rest its decision on due process grounds, it seems inescapable that its decision was rooted to some degree in the notion (expressly stated in other cases requiring warnings regarding the self-incrimination privilege)[20] that it is somehow unfair to call persons to testify before the grand jury when the government has evidence suggesting that they might be subject to criminal prosecution and when the interrogation is likely to encompass inquiry into areas where truthful responses could prove incriminating.

The only conceivable "fairness" rationale for a "target" warnings requirement, however, is that such a warning might have an impact on the witness's

[20] See the courts of appeals' decisions in *Mandujano* (496 F.2d 1050, 1058) and *United States* v. *Wong*, C.A. 9, No. 74-1636, *supra*.

evaluation of whether to testify or to invoke his privilege—a decisionmaking process that is afforded all the constitutional protection to which it is entitled by the Self-Incrimination Clause. Thus the Due Process Clause contributes nothing to the resolution of the question whether warnings of any nature—whether of the privilege or of "potential defendant" status—are required.

Assuming, however, that there are other policies implicated by the Due Process Clause, independent of the constitutional policy against compulsion, that might bear upon grand jury witnesses' entitlement to warnings of some sort, we submit that there is nothing unfair in the failure to administer "target" warnings to witnesses such as respondent and that therefore there is no basis for holding them to be required by due process considerations. As we suggested above, witnesses who are actually "putative defendants" know better than anyone else whether they have committed the crime or crimes that the grand jury is investigating. Only in the most extraordinary circumstance—as, for example, when a grand jury witness does not know that he has committed a crime—will a witness learn of his "putative defendant" status later than the prosecutor, and even in those rare cases it will not automatically follow from the witness's ignorance of his lawbreaking that the prosecutor's failure to apprise him was so unfair as to violate due process.[21]

[21] Cf. *United States* v. *Kimball*, *supra*: "Cases have undoubtedly arisen where persons have been called to give evidence

Moreover, even if a witness is a prime target, he may wish to confess his part in the offense (the Constitution reflects no policy against voluntary confessions) or may be able to exculpate himself to the satisfaction of the grand jury. See *United States* v. *Winter*, 348 F.2d 204 (C.A. 2), certiorari denied, 392 U.S. 955. In those circumstances, it can hardly be said to have been fundamentally unfair for the government to have summoned and questioned the witness without giving a "putative defendant" or "target" warning.

The facts of the present case do not show anything approaching a due process violation. Respondent sought the release of his truck from Assistant United States Attorney Stuckey, who questioned him about the circumstances of the stolen motorcycle's presence and found questionable respondent's explanation that it had been abandoned by a stranger to whom he had given a ride (A. 44-48). The circumstances of their conversation were harried and rushed (A. 46-47), and

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under such circumstances of ignorance of law, fact, and the occasion of their presence as to amount to misconduct on the part of the grand jury or prosecuting officer in using the same as a basis for indictment, and such instances will arise in the future. Then the courts will meet the facts according to their deserving" (117 Fed. at 166).

Nor can the government be said to "entrap" individuals suspected of crime by calling them before the grand jury without giving "target" warnings (cf. *United States* v. *Mandujano*, 496 F.2d 1050, 1058 n.8). Entrapment exists only when government officials "implant in the mind of an innocent person the disposition to commit" an offense (*Sorrells* v. *United States*, 287 U.S. 435, 442; *United States* v. *Russell*, 411 U.S. 423, 436).

Assistant Stuckey did not at that time have a clear notion of what the case was about (A. 46). His sense that something was amiss with respondent's explanation, and his fear that respondent might not return voluntarily to testify about his friends before the grand jury, prompted him to serve respondent with a subpoena to assure his appearance (A. 46, 48). This was clearly no abuse of the grand jury procedure: a crime had been committed and respondent by his own volunteered statements had demonstrated himself to be peculiarly knowledgeable about circumstances surrounding the crime.

Assistant United States Attorney Shine, who was conducting the grand jury proceedings on the day respondent appeared to testify, followed his usual practice of warning witnesses whom he considered might be indicted of their rights, but he himself had no fixed intention to seek an indictment against respondent (A. 57-58):

> My reaction to that story was that "I'm not sure whether the Grand Jury is going to believe it," and so as a matter of precaution I just thought that I would be overly cautious and warn him of his rights before he testified.
>
> Before I put him in the Grand Jury and was able to in detail question him about the circumstances of how he became in possession of the truck, I did not know whether his was a believable story that he did not know that the motorcycle was stolen and was put in his truck and nor therefore did the two men who were arrested later in possession of this truck and the

motorcycle, and so as a matter of precaution and not because I had any belief at that time that he was confessing to any offense, but as a matter of precaution, I decided to warn him of his rights.

Q And so you then envisioned the possibility that the Grand Jury may indict him on this charge, is that right?

A I thought that the Grand Jury might conceivably disbelieve him and decide that when he took, if he admitted that he took possession of the motorcycle while he was in possession of the truck that they could decide to indict him. It would be a matter for the community, that is, the Grand Jury.

Q From the story that you knew or the statement that you knew that he had already made you thought there was a possibility? If he had given the same statement which he had previously given to Mr. Stuckey, you knew there was a possibility that he could be indicted?

A Yes, of course. That's why I warned him of his rights. What I'm saying to you is that I had not decided, I in my own mind as a prosecutor had not decided, that this man was going to be indicted. He had an explanation about how the motorcycle got into the truck which might result in all three men, himself and the other two men, being ignored by the Grand Jury and the whole matter being closed.

On the other hand, I was interested in presenting the whole matter to the Grand Jury so they could decide whether to ignore all three men or indict the two men who were arrested in possession of the truck or indict Mr. Washington by himself or do what they chose on whatever they decided to believe having heard the testimony of Mr. Washington.

Assistant Shine also testified that respondent said that he understood the warnings he received and appeared fully to have comprehended them, that respondent also appeared to have had no difficulty understanding the questions that were put to him, and that respondent had indicated no reluctance to answer any of the questions asked (A. 52-53).

None of the foregoing was controverted, and respondent offered no other evidence that would show that the government's conduct in this case, designed primarily to aid the grand jury in ascertaining whether a crime had been committed and if so by whom, either subjected him to any hardship or violated any of his fundamental rights. Nor did the government deceive him, or in any way participate in an unlawful practice.[22] Cf. *Lewis* v. *United States*,

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[22] The court of appeals stated (Pet. App. 3a), in commenting on the government's failure to advise respondent that he was a "potential defendant," that he "was only told that he was needed [to testify] as a witness in prosecuting the two who were occupants of the van at the time of its impoundment." Apparently this was a reference to the statement by Assistant United States Attorney Stuckey (who served respondent with the subpoena for his grand jury appearance) during the suppression hearing (A. 45) that "I think I might even have told him, of course, that he would be needed as a witness and I would give him a subpoena." Nothing in this statement, or in any other made by Stuckey, indicates that respondent was in any way misled by the government into believing that he was in fact *not* a potential defendant, or indeed that the government sought his testimony

385 U.S. 206. At the time of the questioning, respondent knew what particular crime the grand jury was investigating; knew that he had some connection with the crime and perhaps the criminal or criminals; knew that the authorities were aware of his involvement; and knew that his innocent explanation of his involvement had been found incredible by the police officer to whom he had first related it. In these circumstances the government's failure expressly to advise respondent that he was a potential defendant can hardly be said to violate "fundamental fairness" or be "shocking to the universal sense of justice" (*Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 246).

In addition to lacking the necessary constitutional underpinning, the effort to provide special rules regulating the treatment of certain categories of grand jury witnesses on the basis of their status as "potential" or "putative" defendants is undesirable as a matter of policy as well. If the grand jury is to have any realistic hope of succeeding in the mission of ferreting out unreported crime and corruption, it is critically dependent on the ability to obtain information from witnesses (such as the respondent herein) who, by virtue of their involvement in or at the fringes of the activities under investigation, are most likely to

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solely in connection with a contemplated prosecution of Zimmerman and Woodard. In fact, Stuckey also testified (A. 47), "I think I might have voiced [the doubts he entertained about respondent's explanation of the motocycle's presence] to him at the time that it didn't make sense," and "I think I did [confront him with those doubts]."

possess the kind of information that is indispensable to a successful inquiry. *United States* v. *Sweig*, 441 F.2d 114, 121 (C.A. 2), certiorari denied, 403 U.S. 932. In many instances the government will have no fixed intention of prosecuting such witnesses at the time they are called to testify, and indeed in some cases a witness's cooperation with the grand jury investigation may actually enhance the witness's chances of not being prosecuted. In all events, the grand jury's constitutional function is likely to be seriously impeded by requiring administration of warnings designed to inhibit the testimonial cooperation of such witnesses.

Substantial problems also surround the identification of the witnesses who may be entitled to such warnings as may be required. An objective test, looking only to whether there was some quantum of incriminating evidence concerning the witness that was available to the prosecutor prior to questioning (see Mr. Justice Brennan's concurring opinion in *Mandujano*, *supra*, pp. 14-15 n. 15, and the lower court decisions in that case), would pose numerous and varied problems for both prosecutors and courts. If an attorney managing the grand jury mistakes a "putative defendant" for an ordinary witness and therefore fails to administer appropriate warnings, the penalty may be the forfeit of society's ability to bring criminal conduct to task. Conversely, the ordinary witness given *Miranda* warnings as a precaution against the possibility of a subsequent determination that he had been a "putative defendant" may be inhibited from

providing the grand jury with useful or needed evidence (perhaps out of fear that he is indeed a prospective defendant). Commentators have stressed the problems inherent in the so-called "objective" test for determining who is a "putative defendant" at the time of grand jury questioning:

> The widespread and intricate investigations by federal grand juries * * * do not lend themselves to simple tests of "focus" or "purpose" or even "probable cause." The existence of probable cause may conceivably be determined after analysis of a lengthy record, but when the grand jurors or prosecutors have not yet analyzed their record, * * * they may not realize it. Yet hindsight * * * particularly if the test is to be objective, could serve to vitiate much of their work by suppressing testimony taken [while the record is being made]. [Enker and Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47, 74 (1964).][23]

[23] This highlights an important distinction in the types of grand jury inquiries that can exist. Sometimes there is a known and reported crime (perhaps an assault or a bank robbery) and the grand jury is convened for the purpose of considering indictment of a particular suspect; in such a context an objective "putative defendant" concept may be adequate. In many other cases, however, the grand jury's efforts are directed toward uncovering the very existence of secret criminal activity (*e.g.*, most probes of official corruption, broad-based inquiries into narcotics trafficking or extortionate credit transactions, or the like). In such instances, the "objective" standard for defining "putative defendants" is inappropriate in fact and likely to be destructive of the effective functioning of the grand jury.

Moreover, given the consequences to the government of a mistaken appraisal or appreciation of the amount or meaning of the evidence against a particular witness that it does possess, an objective test would in effect bring every grand jury witness against whom the government has any potentially incriminating evidence within the protective ambit of the "putative defendant" label. As to many of these witnesses, however, the government has no actual intention of seeking an indictment—because the witness (perhaps occupying a lower echelon of an ongoing criminal enterprise) is more valuable as a source of evidence against others; because the witness's alleged offense is trivial relative to the time and resources necessary to prosecute him; or because the evidence is deemed inadequate to indict. Indeed, an objective test would discourage the cooperation of precisely those witnesses whose knowledge of illegal activities is most crucial to the grand jury's efforts to determine whether crimes have been committed and, if so, who is involved.

Thus, assuming that some warnings are required in the grand jury context, the witnesses entitled to receive them should be identified according to a subjective as well as an objective standard, with principal emphasis on the former. That is, it must be established both that the witness was in fact a target of the grand jury investigation whom the government attorney expected to be indicted (or anticipated might be indicted, as in this case), and that the government possessed substantial evidence to support

an indictment at the time the witness appeared to testify before the grand jury. Indeed, to the degree that any warnings requirement that may be imposed is based on considerations of due process and fairness, it would seem that the prosecutor's state of mind would be a principal, if not the essential, subject of inquiry into the propriety of the government's conduct with respect to individual witnesses. Although the prosecutor's intentions are irrelevant to the question whether the Self-Incrimination Clause requires that certain witnesses be warned of their constitutional privilege (*supra*, pp. 29, 34-36), it would seem to us anomalous to find governmental misconduct amounting to a denial of due process in a case where, although in hindsight it appears to a court that the government's cumulative evidence against a grand jury witness was so incriminating as to require warnings, the government attorney's failure to administer warnings stemmed from his belief, based on a good faith appraisal of the evidence known (and reasonably knowable) to him, that none was necessary.

IV. Even If Warnings Are Required, It Is Not Necessary That They Be Given Out Of The Presence Of The Grand Jury

The court of appeals ruled that, by "waiting until after administering the oath in the cloister of the grand jury before undertaking to furnish" *Miranda* warnings to respondent, the government prosecutor had rendered the warnings inadequate to protect respondent's privilege against compulsory self-incrim-

ination (Pet. App. 3a).[24] Although the court articulated no reasons for requiring that warnings be given out of the presence of the grand jury, nor suggested what interval between warnings and questioning would pass constitutional muster, presumably its holding reflected a concern that the prosecutor had delayed administering them until a point at which—due either to the presence of the grand jury itself or to the imminency of questioning—their receipt would be ineffective.[25]

In our view, even assuming that the Constitution requires that some warnings be given, it does not

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[24] The trial court was similarly concerned "that no counselling * * * was provided by the Assistant United States Attorney to [respondent] before entering the Grand Jury room, nor was any other action taken by the Assistant United States Attorney to assure that [respondent], before entering the Grand Jury room, understood and appreciated in the light of his background and educational qualifications the potential impact involved in a waiver of Fifth Amendment rights * * *" (A. 70-71).

[25] That is the import of the view summarily expressed by a minority of the court in *Jones* v. *United States*, 342 F.2d 863, 869-870 (C.A.D.C.) (*en banc*), cited by the court below (Pet. App. 4a).

Standard 3.6 of the ABA Project on Standards for Criminal Justice, *The Prosecution Function*, which the court also cited (Pet. App. 3a-4a), reflects the view that the prosecutor should not call before the grand jury a witness who has declared his intention to invoke his privilege against compulsory self-incrimination—since, it is said, "the very exercise of the privilege may prejudice the witness in the eyes of the grand jury" (see Commentary to Standard 3.6). The Standards reflect no policy against administering the warnings in the presence of the grand jury, however, and we do not understand

forbid their administration in the presence of the grand jury. There is no evidence in this case to indicate that the warnings respondent received were not given in time effectively to apprise him of his rights, and neither respondent, the trial court, nor the court of appeals cited any evidence in support of the belief that as a general matter warnings given in the presence of the grand jury are ineffectual *per se*. Indeed, it would seem equally if not more plausible that the issuance of warnings in front of the grand jury immediately preceding questioning would be *most* effective, since that would be the time nearest when the witness must actually decide whether to invoke the privilege or answer questions. Moreover, the presence of the jurymen and reporter might assure that the warnings are administered accurately and lend spe-

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the court of appeals' holding in the present case to have been based on a fear that the administration of warnings "in the cloister of the grand jury" somehow prejudiced the grand jury against respondent. Such a fear, in our view, would be unfounded in any event. If the witness testifies forthrightly after administration of warnings in front of the grand jury, then any suggestion arising from the warnings that the witness had something to hide will have been negated. If, on the other hand, the witness invokes his privilege, then the grand jury is probably less likely to draw improper adverse inferences than if the government attorney had not in their presence specifically advised the witness that the constitutional privilege might be invoked. In either case prejudice on the part of the grand jury *from the warnings alone* (respondent never invoked his privilege, and thus could not have suffered any prejudice on that account) is not so likely, or, if present, likely to be of such magnitude, to require as a matter of constitutional law that whatever warnings are necessary must be administered out of the grand jury's presence.

cial gravity to the prosecutor's words in the mind of the witness. At the very least, we submit, the record below contains no indication that the deliberative atmosphere of the grand jury room is any less conducive to rational decisionmaking on the part of the witness than the courthouse hallway or the prosecutor's office. Accordingly, the imposition of a constitutional requirement that such warnings as may be deemed necessary must be given out of the presence of the grand jury was unwarranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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